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# In the Supreme Court of the United States.

OCTOBER TERM, 1884.

ORIGINAL DOCKET No. 4.

*Ex parte* JAMES S. WILSON.

BRIEF FOR THE UNITED STATES.

**What is an Infamous Crime under the 5th Amendment of the Constitution?**

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Undoubtedly this court possesses, as incidental both to its original and appellate jurisdictions, the right to issue the great writ of *habeas corpus*.

But its power to exert by this writ its appellate jurisdiction over the judgments of the inferior courts of the United States in criminal cases is extremely narrow and confined, extending no further than to look into the record to see whether the particular case was *coram judice* or not; for if it was, then, whatever may be the ground on which the judgment is assailed, it amounts to error only, which this court cannot reach by writ of error, let alone by *habeas corpus*.

It follows, therefore, and no more is claimed by the petitioner, that the application now made for the writ of *habeas*

*corpus* must be denied unless it can be established that the court by virtue of whose judgment the petitioner is undergoing penal servitude did, in some way, transcend its jurisdiction in rendering that judgment.

The first ground on which it is contended that the court below exceeded its commission is that the judgment is on a conviction upon an information for an infamous offense, and in violation of the fifth amendment of the Constitution, which provides, *inter alia*, that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces, or in the militia, when in actual service in time of war or public danger."

If the contention that the conviction was for an infamous offense is founded, then, according to the decisions of this court, the petitioner is entitled to his discharge.

It becomes necessary, therefore, for the court to determine whether the offenses laid in the information are infamous in the sense of the Constitution.

The information, in its first count, which was under section 5430, Revised Statutes, charged that the accused had in his possession, with a fraudulent intent, an obligation engraved and printed in the similitude of an interest bearing coupon bond of the United States; and in its second count, which was under section 5431, Revised Statutes, charged that the accused did utter and attempt to utter a forged United States interest-bearing coupon bond, and with the information, and referred to in it, was filed a copy of the instrument described in both counts (R. pp. 6, 7).

By the term "infamous crime," the Constitution points to a class of offenses known to the only system of jurisprudence which its framers can be supposed to have had in view, namely, the common law of England, to which, as this court has repeatedly held, we must go, as to a dictionary, to ascertain the meaning of legal terms employed in that instrument.

Congress has not said that the offenses set out in the information in this case shall be infamous, and therefore the question does not arise here whether the mere designation by Congress of an offense as infamous is enough to bring it within the fifth amendment.

The common law, like the civil law, has a class of offenses which it denominates *infamous;* but the offenses of this class are by no means so numerous or so well defined in the former as in the latter.

Under both systems of law a judgment founded on a conviction of an infamous offense works a forfeiture of rights. The effect of such a judgment, at common law, was to incapacitate the party convicted to be a juror or a witness.

In his judgment in *Ville de Varsorie* (2 Dod., p. 174) Lord Stowell lays down that by the *civil law*, to render incompetent as a witness one who has been *damnatus publico judicio*, "the publicum judicium must be on an offense *implying such a dereliction of moral principle as carries with it a conclusion of a total disregard to the obligation of an oath.*" This Mr. Greenleaf (Ev., sec. 373) takes up and adopts as expressing an essential element of an infamous crime at common law. The same view is advanced in the cases of Chase *v.* Blodgett (10 N. H., 29), State of Ne-

vada *v.* Foley (15 Nev., 64), and State *v.* Candler (3 Hawks, 403).

As this view of the law somewhat increases the difficulty of determining what crimes fall under the head of infamous it is proper to consider whether it is founded or not.

Among the offenses termed infamous are treason, murder, manslaughter, and *præmunire*, which at once suggest the inquiry if the conviction of any one of them infers "such a dereliction of moral principle *as carries with it a conclusion of a total disregard to the obligation of an oath;*" if, in other words, the unsuccessful and, it may be, conscientious leader of a rebellion, if the man who has killed another in a duel upon some punctilio of honor, or who has committed homicide under provocation and in hot blood, or who, in times past, pushed the papal pretensions beyond the sufferance of law, must needs have undergone such a moral transformation as to warrant, nay, compel, the conclusion that he is become dead to the obligation of an oath? So far, however, from any such inference being justified by observation of human conduct, we submit that it is too plain there is nothing in any of the crimes mentioned which is inconsistent with perfect fidelity to truth.

If moral perversion enters into the conception of infamous offense it is difficult to comprehend why it does not embrace, as we shall see it certainly does not, some offenses from a conviction of which a disregard of the obligation of an oath may be properly inferred, and which are deemed everywhere quite sufficient to sap the credit of the witness on whom they are fastened.

We submit that the idea of moral perversion to the extent of a disregard of truth does not necessarily enter into the definition of infamous offense, and that the incompetency to be a witness or juror which ensued upon conviction of certain offenses followed as *part of the punishment*, having nothing to do with the moral complexion of the offense.

Lord Coke tells us (3 Inst., 222) that where parties are convict of false conspiracy under the pretext of law to convict an innocent man of a capital offense, "the villanous judgment" was pronounced on such conviction, one of the elements of which was "that they forever shall lose the freedome and franchise of the law. That is, first, they shall never be of any jury or recognitors of assise. Secondly, *nor ever be received for a witnesse in any case*."

This judgment has been long obsolete, and the forfeiture of *libera lex*, albeit still in force, is no longer expressed in the judgment on a conviction of conspiracy or any other infamous offense.

The question whether incompetency to testify is part of the punishment of an infamous offense came before the supreme court of Massachusetts in the noted case of Commonwealth *v.* Green (17 Mass., 515). It was an indictment for murder, and the prisoner moved for a new trial on the ground that it had transpired since the trial that one of the witnesses examined against him was incompetent from infamy consequent upon a judgment on his conviction of larceny in the State of New York. Upon the point thus raised the court say, "Infamy is, in truth, part of the punishment of the *crimen falsi*, although not expressed in the sentence; and it creates a disability to testify, just as an excommunication in a spiritual court does to sue

in the courts of common law. To hold a person incompetent on account of such a conviction, is to give effect to the conviction, and to enforce the punishment; and thus the penal laws of one country would reach into others contrary to the principle above stated." This case is approved in Story on Conflict of Laws, Sec. 92, although its soundness is attacked in a note to this section in the seventh edition of that work. The note proceeds on what we deem the unsound view of Mr. Greenleaf and the cases of Nevada *vs.* Foley, State *vs.* Candler, and Chase *vs.* Blodgett, *supra*, namely, that an offense to be infamous must have proceeded from a mind lost to the obligation of an oath. But the doctrine of Comm. *vs.* Green was clearly the view of Lord Stowell in *Ville de Varsovie*, for he says: "It [the prize court] must not place itself in the unseemly situation of carrying *the penal law of England* (*for such is the nature of the present question*) one hair's breadth further than the common law of England can be shown to have already carried it" (Supra, p. 186). Commonwealth *vs.* Green is also approved in New York, Sims *vs.* Sims, 75 N. Y., 469, and National Trust Co. *vs.* Gleason, 77 N. Y., 410.

If this view is not correct then the law is defaced by a grave inconsistency in putting the stigma of infamy on some only of the *crimen falsi*, when, on the ground of credibility, it should be placed on the whole of that class.

We come now to the question, What offenses fall under the head of infamous?

No jurist has yet ventured to say that the offenses which have been adjudged to come within this class are *all* that the class embraces. The law in this particular has always been given indefinitely by the most authoritative writers,

particularly the older ones. For instance, that most philosophical and full-minded author, Lord Chief Baron Gilbert, lays down in his book on evidence (p. 126, ed. 6, London, 1801) that there are several crimes that produce incompetency to testify, "as treason, felony, and every *crimen falsi*, as perjury, forgery *and the like;*" from which we are to conclude that the law on this subject was very unsettled at that time, and much more so even than it is now, as we shall see.

In his work on criminal law Mr. Russell states the law thus: "There are certain offenses of which if a person be convicted he becomes incompetent to give evidence. Such are treason, felony, and *every species* of the *crimen falsi*, such as forgery, perjury, subornation of perjury, and other offenses of the same description, which involve the charge of falsehood *and affect the public administration of justice*" (p. 973, vol. 2). The authorities cited in support of this proposition, and those which follow it, seem to warrant this definition.

Precisely the same view of the law is taken by the supreme court of Pennsylvania (3 Watts & Serg., 242–3, Comm. *vs.* Shaver), and presented almost in Mr. Russell's own words. And by way of enforcing the view that outside the crimes specified by Mr. Russell, none can be classed as infamous unless involving the *charge of falsehood and affecting the public administration of justice*, the court refer to the offense of bribery, which, they say, when taken in a restricted sense, may be regarded as infamous, rendering the party convicted of it incompetent as a witness that is to say, when the bribery consists in "receiving or offering any undue reward by or to any person whatsoever, *whose*

*ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office and incline him to act contrary to the known rules of honor and honesty.*" And the court go on to say that the corrupt and illegal practice of "giving rewards or making promises in order to procure votes in the elections of members to serve in Parliament, although in a more extended sense denominated bribery and punishable at common law (Rex *vs.* Pitt, 3 Burr, 1335, *per Lord Mansfield*), *have never been held to render persons convicted thereof infamous or incapable of giving evidence or serving as jurors.* Indeed, I think, I may say it has never occurred to any one to make the objection as founded upon the principles of the common law, which, of itself alone, is very powerful, if not conclusive evidence, to show that such corrupt and illegal practices were never considered *infamous crimes.*" The court then refers to the fact that if such had not been the law the occasion would not have existed for Parliament's passing laws making conviction of bribery in the larger sense work a disqualification to hold office or testify and the like. See, also, the more recent cases of Bickel *vs.* Fasig (33 Pa. St., 464–5), Schuylkill County *vs.* Copley (67 Pa. St., 390), and the argument of counsel in Commonwealth for use, &., *vs.* The Ohio and Pa. R. R. Co. (1 Grant's cases, p. 331).

In the State *vs.* Randolph (24 Conn., 365), the court say: "So far the courts have gone, and from these decisions it may be deduced that the *crimen falsi* of the common law not only involves the charge of falsehood, but also is one which may injuriously affect the adminis-

tration of justice, by the introduction of falsehood and fraud."

Lord Hale (P. C., 277) mentions conspiracy in the catalogue of infamous offenses, and so does Lord Coke (Co. Litt., 6b), but the conspiracy they refer to is the one that was visited with the terrors of the savage "villanous judgment," namely, a conspiracy to compass the conviction of an innocent person of a capital offense. (*Vide*, 3 Inst., p. 222.)

In Clancy's case (Fortescue's Rep., p. 208) the question laid before the judges called in to assist the House of Lords was whether Clancy, who had been convicted of bribing a witness to withdraw himself into France, thereby to prevent his further evidence against the Lord Aylesbury, the Lord Montgomery, and Sir John Fenwick, was a competent witness. It was held by seven of the judges (Holt, C. J., yielding a hesitating assent) that "Clancy could never after be admitted a witness in any case, for that he was become *infamous*," &c. The judges are reported to have concluded their opinion with these words: "And this was a crime not merely of misbehaviour, like a riot or libel, *but even of corruption relating to evidence and testimony*, and it was against reason to admit that man as a good witness who has been convicted of bribing and corrupting a witness."

Mr. Stephens, in his Nisi Prius (p. 1721), is perhaps the only author who has attempted to give a list of infamous crimes. He says "Persons convicted of treason, felony, piracy, *præmunire*, forgery, perjury, subornation of perjury, attaint of false verdict, *bribery of a person to withhold his evidence*, conspiring to procure the absence of

a person summoned as a witness on an information against the revenue law, conspiring to accuse another of a capital offense, *or a person convicted of an indictment for any other species of conspiracy*, barratry, winning over £10 by fraud or ill-practice at gambling [under Stat., 9 Anne, C. 14, S. 5], and persons outlawed for treason and felony, are considered infamous."

The only criticism we will venture to make on this passage is to say that the author is mistaken in classing among infamous crimes a conviction or an indictment "*for any other species of conspiracy.*" The authority he cites, The King *v.* Priddle (1 Leach, C. C., p. 442), does not support him. The ground on which the witness in that case was held incompetent was that he had been convicted of "conspiracy." It does not say what sort of conspiracy, but we are bound to infer from this omission that it must have been a conspiracy of some sort affecting the public administration of justice, as was the sense in which the term was taken when used without words of qualification, as appears by Lord Coke and Lord Hale (*supra*). And this would seem to follow from the opinion of Mr. Justice Buller. He says, "*conspiracy* is a crime of blacker dye than *barratry* and the testimony of a person convicted of barratry has been rejected." Again, "a conviction, therefore, of any offense of *crimen falsi* destroys the competency of the person convicted, as perjury, forgery, by the common law, &c." Certainly his comparing the conspiracy of which the witness stood convicted with the offense of barratry, which consists in moving, exciting, or maintaining suits, quarrels, or parts, either in courts or elsewhere in the county (Co. Litt. 368,) together with his

reference to the *crimen falsi* tend to show that the conspiracy in question was of a character to affect the administration of justice. According to Russell, it must have been a conspiracy to accuse another of a capital offense (Crimes, Vol. 2, p. 973) deserving the "villanous judgment" and loss of the freedom of the law. See the comments, *arguendo*, on *Rex. v. Priddle* in 1 Grant's Cases, page 332, Comm., &c., *vs.* R. R. Co.) In Ville de Varsovie and others (2 Dod., 190), Lord Stowell expresses his assent to the argument that "conspiracy" had the confined technical sense to which we have referred—"a meaning arising out of the manners of the times, when men of wealth collected numbers together for the purpose of oppressing others. *In that sense it travels well in a course of legal guilt along with barratry (which stands in the catalogue with it)*, the one being an oppression by force of arms, the other under a colorof law.

We think it may therefore be safely said that Mr. Stephens has fallen into an inadvertence in supposing that the reference to conspiracy in Priddle's case meant *every kind of conspiracy*.

As supporting the view that offenses may be on the same plane morally, and yet some be infamous and others not, we take leave to quote the following from Mr. Stephens's Nisi Prius (p. 1722): "It is not every species of falsehood or fraud that will create an incompetency in the actor, although impairing the credibility of his testimony; thus, the following offenses do not render the guilty parties infamous: outlawry in a personal action; keeping a public gaming-house; convicted of perjury, but before judgment; convicted under an indictment for conspiracy

to raise the price of the public funds by spreading false rumors concerning them."

Referring to the comprehensiveness of the term *crimen falsi* in the civil law, including every species of fraud and deceit, the supreme court of Pennsylvania say: "But it is clear that the common law has not employed the term in this extensive sense when applying it to the disqualification of witnesses, because convictions of many offenses clearly belonging to the *crimen falsi* of the civilians, have not this effect. And he [Mr. Greenleaf] instances deceits in the quality of provisions, deceits by false weights and measures, conspiring to defraud by spreading false news, &c." (Bickel *vs.* Fasig, 33 Pa. St., 465). See, also, to the same effect, Schuylkill County *vs.* Copley (67 Pa. St., 390).

In the already cited case of *Ville de Varsovie, and others*, objection was made to the admissibility of an affidavit made by Lord Cochrane on account of his lordship's incompetency to give evidence in any court of justice, by reason of his having been convicted of a conspiracy to defraud by circulating false intelligence for the purpose of occasioning a temporary rise in the public funds. The question was a novel one at Doctors Commons, and was decided with great deliberation by Lord Stowell, and not until he had conferred with some of the judges, as was Lord Chief Justice Abbott's impression, expressed in Crowther *vs.* Hopword, 3 Stark., 22. Lord Stowell held the affidavit admissible on the ground that his researches had not brought to light a single case in which a conspiracy to cheat had been ruled to be infamous. A similar ruling was made in Crowther *vs.* Hopword (*supra*).

In the case of Utley *vs.* Merrick (11 Met., 302), which

was trespass *q. c. f.*, a witness was objected to as incompetent on the ground that he had been convicted and sentenced for obtaining goods under false pretenses. The court held the witness competent, and approved the doctrine of Mr. Greenleaf, "that the *crimen falsi* of the common law not only involves the charge of falsehood *but is also one which may injuriously affect the administration of justice*, by the introduction of falsehood and fraud." The learned judge (Wilde) refers to the fact that infamy does not attach to the conviction of the "atrocious offense" of publishing a malicious libel, or of bigamy.

In the United States *vs.* Yates (6 Fed. Rep. 861) it was held on a motion in arrest of judgment that the offense of passing counterfeit dollars was not infamous and, therefore, that an information would well lie. In United States *vs.* Field (16 Fed. Rep., 778) it was ruled, upon the authority of the preceding case, that an information would lie for passing counterfeit money of the United States.

In United States *vs.* Wynn (9 Fed. Rep., 886) it was held that stealing from the mail is not an infamous offense.

The elaborate note of Mr. Wharton to the case of United States *vs.* Field (16 Fed. Rep., 779), proceeds upon the reasoning that as forgery is an infamous crime so must be passing counterfeit money, inasmuch as the latter infers the same complexion of turpitude as the former. But this line of reasoning leads to the most alarming consequences by stigmatizing offenses as infamous which have not been so classed heretofore, and is expressly rejected as unsound in some of the authorities I have referred to. It is unnecessary to say that Mr. Wharton is of that class of jurists who hold that infamy springs from the presumption that

the party under its disability is incapable of telling the truth or insensible to the obligation of an oath.

In addition to the authorities already cited on this point, we refer to the opinion of Judge Brown denying the petitioner's application and given in the appendix of this brief.

It is argued here that the offense charged in the second count of the information, namely, passing a forged obligation of the United States, is infamous, and upon the ground that the crime of forgery is of that dye; but the immense chasm between the two offenses seems to be lost sight of, the one, that is, forgery, being most aggravated, while the other is no more than a *cheat* (Fox *vs.* Ohio, 5 How., 410). As we have seen, it by no means follows that because some of the *crimen falsi* are infamous all are so. The books do not furnish a single instance where it was decided that the offense of uttering forged money or obligations is infamous. Certainly the laws of Michigan cannot be referred to to ascertain the complexion of offenses against the United States, as seems to be supposed by the learned counsel opposite, for that can only be determined by reference to the acts of Congress by which these offenses were created.

Now, when it is considered that a person incompetent from infamy is in some degree *civiliter mortuus*, so that, if he be the attesting witness of any instrument before conviction, evidence may be given of his handwriting, just as if he was dead, or his goods may be stolen, his dwelling broken into by the midnight robber, or burned by the incendiary; his child may be beaten, or his wife murdered before his face, and the offender escape because of the incapacity of the injured man to give evidence against him,

it may well be urged that the court should refuse to apply the stigma of infamy in any but the clearest cases.

The next point is that an information does not lie at the suit of the United States in any case not referred to in section 1022, Revised Statutes, which authorizes a proceeding by information in all cases not infamous arising upon the seventh chapter of the title "Crimes." It is conceded that the present case does not fall within that chapter.

This argument proceeds on a misapplication of the canon *expressio unius est exclusio alterius* which, Judge Story remarks, is frequently misapplied.

It certainly cannot be inferred that Congress intended by mere implication to do away with the established and much used procedure by information merely by expressly providing that certain offenses of a particular class might be prosecuted in that way.

According to this argument it must be held that because the Constitution gives Congress the express "power to define and punish piracies and felonies on the high seas" it is, by implication, denied the power to punish any other offenses on the high seas.

But suppose the argument to be a valid one, is it more than error in the court to have proceeded by information instead of indictment, it being now assumed that neither of the offenses charged is infamous? The court had jurisdiction over the person and the offense.

A.

Another ground on which the petitioner claims his discharge is that he was convicted on the count charging him

# APPENDIX.

## *In re* WILSON.

(*District court, E. D. Michigan.* October 8, 1883.)

1. PASSING COUNTERFEITED OBLIGATION OF UNITED STATES—REV. ST. §§ 5430 AND 5431—INFORMATION
   *It seems* that a person accused of passing a counterfeited obligation of the United States may be prosecuted by information.
2. SENTENCE OF CONFINEMENT—PENITENTIARY IN ANOTHER STATE.
   In sentencing a prisoner to confinement in a penitentiary outside the limits of the State in which he was tried, it is not necessary that the record of his conviction should show that there was no penitentiary within that State suitable for the confinement of prisoners from the Federal courts, or that the Attorney-General had designated the penitentiary in question for such purpose.
3. HABEAS CORPUS—CERTIFIED COPY OF SENTENCE.
   A certified copy of the sentence of a court of record is sufficient authority for the detention of a convict. No warrant or *mittimus* is necessary.

This was an application for a writ of *habeas corpus* to release a prisoner confined in the Detroit House of Correction, under sentence from the district court for the eastern district of Arkansas. A copy of the record of his conviction was annexed to his petition, from which it appeared that he was found guilty upon an information which contained a count under Rev. St. § 5430, for having in possession, with fraudulent intent, an obligation engraved and printed after the similitude of an interest-bearing coupon bond of the United States. The information also contained a second count, under section 5431, for passing and attempting to pass a counterfeited obligation and security of the United States. A copy of the obligation in ques-

tion was attached to the information. It purported upon its face to be a gold-bearing bond, in the sum of a thousand dollars, of the United States Silver Mining Company of Denver City, Colorado, signed by the president and secretary of the company, and having a strong resemblance to a genuine interest-bearing coupon bond of the United States. The words "United States" were printed in large and conspicuous capitals, while the words "Silver Mining Co. of Denver City, Col.," appeared in small, indistinct type, at a considerable distance below the others. The bond was numbered and lettered very much like a genuine Government bond. It was agreed by counsel that the merits of the case should be disposed of upon the application for a writ without the formality of its issue and return. Petitioner demanded his discharge upon the following grounds:

(1) Because he was convicted upon an information, and not upon an indictment; (2) because sentence was imposed upon him for a crime of which he was not convicted; (3) because it did not appear from the record that the court had power to sentence him to a prison outside the State of Arkansas, and made no finding that there was no jail or penitentiary within the State suitable for the confinement of persons convicted of crime against the United States, or that the Attorney-General had made the proper designation for that purpose; (4) because he was not confined under any proper warrant or *mittimus*.

*Alfred Russell*, for petitioner.

*S. M. Cutcheon*, dist. atty., for the United States.

Brown, *J.* 1. The prisoner was convicted upon an information charging him with the fraudulent possession of an obligation in the resemblance and similitude of a Government bond, and with passing a counterfeited obligation of the United States. It is claimed that these are "infamous" crimes, within the meaning of the Constitution, and that the court had no jurisdiction to proceed except upon indictment of the grand jury. There is no definition of the word "infamous" to be found in the Statutes, although, by the law of this and several other States, the word "felony" includes every offense punishable by death or im-

prisonment in the State prison. It seems hardly necessary to say that this definition does not obtain in Federal jurisprudence, inasmuch as many of the most trifling misdemeanors are punishable by imprisonment in the State prison. Revised Statutes, § 721, adopting the laws of the several States, applies only to civil cases. It has been repeatedly held that the fact that an offense may or must be punishable by imprisonment in a penitentiary does not make it in law infamous. (*U. S.* v. *Reid*, 12 How., 361; *U. S.* v. *Maxwell*, 3 Dill., 275; *U. S.* v. *Coppersmith*, 4 Fed. Rep., 198; *U. S.* v. *Wynn*, 9 Fed. Rep., 886; *U. S.* v. *Block*, 4 Sawy., 211.)

The question whether the utterance of forged paper is a felony, was exhaustively discussed by Judge Hammond in *U. S.* v. *Coppersmith*, *supra*, and the conclusion reached that it was a mere cheat or misdemeanor. See, also, *Fox* v. *State*, 5 How., 410. It would naturally follow that it was triable by information, and such was the opinion of Judges Blatchford and Benedict in *U. S.* v. *Yates*, 6 Fed. Rep., 861, and by Judge Wheeler in *U. S.* v. *Field*, 16 Fed. Rep.. 778. In *U. S.* v. *Wynn*, 9 Fed. Rep., 886, Judge Treat took a still more advanced position, and held that no crime is infamous, within the meaning of the Constitution, unless expressly made infamous or declared a felony by an act of Congress. An information for stealing from the mail was here sustained. But see *U. S.* v. *Block*, 4 Sawy., 211. The only case I have found to the contrary is that of *U. S.* v. *Cultus Joe*, 15 Int. Rev. Rec., 57, wherein it was held that proceedings by a criminal information in Federal courts were unknown and unauthorized. In so far as this case is applied to offenses not infamous, it must be considered as overruled by a great preponderance of authority. I do not think the case is affected by implication by Rev. St., § 1022, since by sections 1044 and 1046 a proceeding by information in other classes of cases is expressly recognized by Congress. In this concurrence of opinion I do not deem it necessary to give the subject

an independent consideration. Even if I entertained some doubt regarding the correctness of the views expressed in these opinions as it is understood, the question is now pending before the Supreme Court, upon a case certified from the eastern district of Missouri (*U. S.* v. *Petit*, 11 Fed. Rep., 58), I should deem it my clear duty, in a case arising upon *habeas corpus*, to sustain the action of a co-ordinate court until the question is settled by higher authority.

2. The prisoner also claims his discharge upon the ground that sentence was imposed for a crime of which he was not convicted. It was argued that he was convicted of having in his possession a bond in the resemblance and similitude of a Government bond, but was sentenced for passing a counterfeited United States interest-bearing obligation. Counsel are in error in this particular. The information contained two counts. The first charged the prisoner with having in his possession, with fraudulent intent, an obligation engraved and printed after the similitude of an interest-bearing coupon bond of the United States. The second charged him with passing and attempting to pass a counterfeited obligation and security of the United States. The prisoner demurred, and his demurrer was overruled. He was then tried, and a general verdict of guilty returned. Motion for a new trial was then made upon the ground that defendant was found guilty under the second count, when there was no evidence to support the same. This motion was overruled. From the charge of the court, returned with the record, it also appears that the case was submitted to the jury under the second count. Finally, the record of his sentence shows that he was convicted under the second count. Whether the prisoner was properly convicted under this count I find it unnecessary to determine, as it is not raised upon this motion. It would seem, however, from the cases of *Ex parte Parks*, 93 U. S., 18, and *Ex parte Carll*, 106 U. S., 521, [S. C. 1 Sup. Ct. Rep. 535], that this being a question within the jurisdiction of the district court of Arkan-

sas to decide, its conclusion would not be reviewable upon a *habeas corpus*.

3. That it does not appear that the court had authority to commit the prisoner to a penitentiary without the State. By Rev. St., § 5541, "in every case where any person convicted of an offense against the United States is sentenced to imprisonment for a period longer than one year, the court * * * may order the same to be executed in any State jail or penitentiary within the district or State where such court is held." And by section 5546, "in case there is no penitentiary or jail suitable for the confinement of convicts, or available therefor, the court may sentence to some suitable jail or penitentiary in a convenient State or Territory, to be designated by the Attorney-General." It is insisted that the sentence in this case is void under section 5541, for the reason that it does not appear upon this record that the requisite conditions existed which authorized an imprisonment in another State under section 5546. The *case of Karstendick*, 93 U. S., 396, throws no light upon this point. This was also a petition for a *habeas corpus* to release a prisoner confined in a penitentiary of West Virginia, under sentence of the circuit court for the district of Louisiana. The sentence recited the fact that it had been in due form determined and ascertained that there was no penitentiary within the district of Louisiana suitable for the confinement of persons convicted of crime in the circuit court of the United States, and that the Attorney-General had designated the penitentiary at Moundsville, in West Virginia, as the place of confinement of all persons sentenced by the circuit court of the United States in the district of Louisiana. The court held that such finding was conclusive, and could not be reviewed upon petition for a *habeas corpus*. It was further held to be no objection to the validity of the order that the State had not given its consent to the use of this penitentiary as a place of confinement of a convicted offender against the laws of the United States. Nothing else was decided in

the case. There is nothing in the opinion of the court showing or tending to show that the recital in the sentence was necessary to its validity. Upon the contrary, it was said (page 403) that "no action of the courts was required. A notification to the courts was, therefore, only necessary for the purpose of influencing their conduct in the future. A sentence in this case for imprisonment in a State penitentiary would not have been void, but it might not have prevented the Attorney-General, acting under the Statute, from directing a removal of the convict to some penitentiary outside of the State."

The question is whether, conceding the power to commit a prisoner to a penitentiary in another State, the judgment of the court should recite the fact that the conditions precedent to the exercise of such power existed. That the court was bound to find that the Attorney-General had designated the Detroit House of Correction as the proper place for the confinement of prisoners from the district court of Arkansas may be assumed; but it does not follow that the court is bound in every case to set forth this fact in its sentence. Suppose, for example, the superintendent of the House of Correction were sued for false imprisonment in this case, would it be necessary for him to show, beyond the conviction of a court of competent jurisdiction, that the Attorney-General had designated his penitentiary as a place for the confinement of prisoners? I think not. This court is bound to presume that the committing court acted within the law. To entitle a party to relief upon *habeas corpus* there must appear a want of jurisdiction in the committing court over the person, or the cause, or some other matter, rendering its proceedings void. (*Ex parte Siebold*, 100 U. S., 371, 375.)

Whenever it appears that the court has obtained jurisdiction of the person and the cause, the maxim, *omnia præsumuntur rite esse acta*, applies with full force. (*Martin* v. *Mott*, 12 Wheat., 19; 2 Phil. Ev., 159 *et seq.*; *Com.* v. *Bolkom*, 3 Pick., 281; *State of Ohio* v. *Hinchman*, 27 Pa.

St., 479; *Doe.* v. *Litherberry*, 4 McLean, 442; *Lathrop* v. *Stuart*, 5 McLean, 167; *Grignon's Lessee* v. *Astor*, 2 How., 339; *Thompson* v. *Tolmie*, 2 Pet., 165.)

4. It is finally claimed that the prisoner is illegally held, because not confined under any proper warrant or *mittimus*. This is clearly unnecessary. The person having custody of the prisoner is bound to show his authority, and the order or sentence of a court of record is sufficient. Hurd, Habeas Corpus, bk. 2, § 8; *People* v. *Nevins*, 1 Hill, 154; *State* v. *Heathman*, Wright, 691. This point was also ruled by the late Judge Longyear in the unreported case of *In re Osterhaus*.

The application must be denied.

See *U. S.* v. *Field*, 16 Fed. Rep., 778, and note, 779; *U. S.* v. *Petit*, 11 Fed. Rep. 58, and note 60.

*Robert Clarke & Co., Printers, Cincinnati, O.* [*October, 1884.*

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

## *EX PARTE JAMES S. WILSON.*

PETITION—RECORD—COMMITMENT.

# PETITION.

## *To the Honorable the Supreme Court of the United States:*

The petition of JAMES S. WILSON for a writ of *habeas corpus* respectfully shows:

*First.* That the petitioner is restrained of his liberty by Joseph Nicholson, Esq., the keeper of the Detroit House of Correction, in which the petitioner is confined in the city of Detroit, in the State of Michigan and Eastern District thereof.

*Second.* That the cause or pretense of the restraint and confinement is a copy of a sentence from the District Court of the United States for the Eastern District of Arkansas, upon an alleged conviction for passing a counterfeit United States bond.

*Third.* The petitioner hereto annexes a copy of the so-called PROCESS by which he is confined; and also a certified copy of the RECORD of the petitioner's alleged conviction, in the last named Court.

*Fourth.* The petitioner is advised, and represents to this Honorable Court, that his imprisonment is illegal, and proceeds to state wherein the illegality consists:

I.

He is held under a judgment of a Federal Court, made without authority of law, and void because in *excess* of the *power* of the Court, and forbidden by Amendment V to

the United States Constitution, having been held to answer for an infamous crime, and punished by a fine of $5,000 and fifteen years' confinement at hard labor, without presentment or indictment of a grand jury.

II.

He is held under a judgment void and in *excess* of the *power* of the Court, upon an information filed by a district attorney for a crime which is both infamous and not committed against the provisions of chapter seven, title Crimes, R. S. U. S., and beyond the authority conferred by section 1022 of said R. S. U. S.

III.

He is held under a judgment void and in *excess* of the *power* of the Court, in this, that as appears from the record, said judgment was imposed for a crime different from that of which he was convicted, the conviction being for having in possession a bond of a mining company in the similtude of a United States bond, and the sentence being for *passing* a *counterfeit* United States bond.

IV.

He is held by the keeper of the Detroit House of Correction without authority of law, because the order of the said Court imprisoning the petitioner in said House is *not brought* within the POWER of the Court by any showing in the record, that the conditions *precedent* to the exercise of the power of the Court to sentence to a prison *outside* of the State of Arkansas have been complied with.

*First.* The Court made no *finding* that there was no penitentiary in the State of Arkansas suitable for the confinement of persons convicted of crime against the United States.

*Second.* The Court did not *find* nor does it appear that the attorney-general has *designated* said House as a suitable jail or penitentiary for the confinement of persons convicted by said Court.

V.

The Detroit House of Correction is not a jail or penitentiary, within the United States statutes.

VI.

Said keeper has no warrant or mittimus authorizing him to hold your petitioner, as required by section 1028 R. S. U. S.

The facts and circumstances of the case are as follows (and petitioner files a certified copy of the Record E. D. Ark., as a part hereof): The petitioner, in the latter part of the year 1880, was possessed of a $1,000 bond, issued by the United States Silver Mining Company, of Denver city, Colorado, not purporting to be an obligation of the United States, and differing from such obligation in form and size and contents; that the petitioner delivered the same to a farmer in the State of Arkansas, where the petitioner resided, as security for $50, which he subsequently paid back, but the farmer refused to redeliver the bond and caused the petitioner to be arrested by the Federal authorities, and was tried and sentenced to fifteen years imprisonment and $5,000 fine, and had suffered imprisonment for upward of *two* years.

Wherefore the petitioner prays for the writ of *habeas corpus*, to inquire into the cause of his restraint.

JAMES S. WILSON,
*Petitioner.*

*Witness*: AUGUSTUS NEURIULT.

ALFRED RUSSELL,
JNO. FITZGERALD,
*Counsel for Petitioner.*

State of Michigan, } ss.
Wayne County, }

Personally appeared before me on this 25th day of August, 1883, James S. Wilson, who signed the foregoing petition, and made oath that he had read the same, and knows the contents thereof, and that the same are true.

R. H. GILLMAN,
*Notary Public, Wayne County, Michigan.*

ALFRED RUSSELL,
*Atty. of Counsel for the Petitioner.*

# Circuit Court of the United States.

*United States*

**No. 171.]** *v.*

*James S. Wilson.*

## RECORD.

UNITED STATES OF AMERICA,

EASTERN DISTRICT OF ARKANSAS.

*Be it remembered*, That at a District Court of the United States of America, in and for the Eastern District of Arkansas, begun and holden on Monday, the 4th day of April, A. D. 1881, at the United States Court Rooms, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, judge, presiding and holding said Court, the following proceedings were had, to wit, on April 15, 1881:

United States
*v.*
James S. Wilson. } Passing Counterfeit Money.

Comes the United States, by Charles C. Waters, Esq., district attorney, and moves the Court for leave to file an information in this case, and shows to the Court that the said defendant has had an examination before a Commissioner of the Circuit Court for this district upon affidavit made before him charging the said defendant with the same offense as in said information, and that upon said examin-

ation he was held to answer at the present term of this Court. Whereupon such leave is granted, and said information is accordingly filed.

Which information is in the words and figures following, to wit:

Comes Charles C. Waters, Esq., attorney for the United States for the Eastern District of Arkansas, and gives the Court here to understand and be informed.

*First count:*

That James S. Wilson, on the 10th day of September, 1880, at the Eastern District of Arkansas, *did unlawfully have in his possession and custody, otherwise than under the authority of the Secretary of the Treasury of the United States, or of any other proper officer of the United States, a certain obligation and security of the denomination of one thousand dollars, engraved and printed after the similitude of certain obligations and securities issued under the authority of the United States; to wit, of interest bearing coupon bonds of the United States, with intent to sell and otherwise use the same for the purpose of defrauding one Wilson W. Smith*, which said false, forged and counterfeit bond is in the words and figures following; that is to say, in the words and figures of a copy of said bond hereto attached and made part of this information, being exact copy as to signatures of officers, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

*Second count:*

That James S. Wilson, on the 10th day of September, 1880, at the Eastern District of Arkansas, with intent to defraud one Wilson W. Smith, did pass, utter, publish, and sell, and attempt to pass, utter publish, and sell, one falsely made, forged, and counterfeited obligation and security of the United States; to wit, one false, forged, and counterfeited United States interest bearing coupon bond of the denomination of one thousand dollars, which said false, forged, and counterfeit bond is in the words and figures following: that is to say, in the words and figures of a copy

of said bond hereto attached and made part of this information, being exact copy, except as to signatures of officers, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. CHARLES C. WATERS,
*U. S. Attorney.*

Endorsed:
Filed April 15, 1881.
RALPH L. GOODRICH,
*Clerk.*

[*Copy of Bond, with twelve Coupons attached.*]

Number 1206.] THE UNITED STATES [Letter A.
$1,000 *Seven per cent Gold bearing Bond.* $1,000

SILVER MINING COMPANY OF DENVER CITY, COLORADO,

Acknowledges itself to be justly indebted unto the bearer in the sum of ONE THOUSAND DOLLARS, lawful money of the United States of America, which sum it promises to pay at the American Exchange National Bank in the city of New York, on the first day of March, one thousand eight hundred and ninety, with interest at the rate of seven per centum per annum, payable on presentation of the annexed interest coupons as they respectively become due, at the American Exchange National Bank in the city of New York. J. H. MAYSON, *Sec'y.*
R. E. HULLSON, *Pres't.*

We, the jury, find the defendant guilty.
H. G. P. WILLIAMS,
*Foreman.*

And on April 23, 1881, the following proceedings were had:

Comes, the defendant, by R. A. Howard, Esq., his attorney, and files herein his demurrer to the information.

Which demurrer is as follows:

Comes defendant and demurs to the information offered

by the attorney for the United States herein, and says that the information is not sufficient in law, and therefore he is not bound to answer the same. Wherefore, etc.

E. W. KIMBALL,
ROBERT A. HOWARD,
*Counsel.*

And on April 26, 1881, the following proceedings were had:

Comes the defendant, by R. A. Howard and Eben W. Kimball, Esqs., his attorneys, and files herein his demurrer to the information, and comes the United States, by Charles C. Waters, Esq., district attorney, and said demurrer is heard, argued, and submitted to the Court, and the Court, being now well and sufficiently advised in the premises, considers that the same be overruled; and comes the said defendant to the bar of the Court, in custody of the marshal, and by R. A. Howard and Eben W. Kimball, Esqs., his attorneys, and having had hearing of the said information, and being demanded concerning the premises how he will acquit himself thereof, he saith that he is not guilty thereof, and thereof for good and evil he puts himself upon the country; and Charles C. Waters, Esq., district attorney, who for the United States in this behalf prosecuteth doth the like, and in presence of the defendant the Court proceeds to impanel a jury, and thereupon a jury came; to wit, Silas Bell, George H. Joslyn, D. J. Miller, R. Resin, Robert Williams, H. G. P. Williams, George W. Shinn, W. H. Langford, C. V. Murray, J. D. Ferguson, Thomas C. Kirkwood, and John C. Morrison, being twelve good and lawful men of the district, who were duly tried, impaneled, and sworn well and truly to try, and a true deliverance make between the United States and the defendant, and a true verdict give according to the law and the evidence; and thereupon the jury proceed to hear the evidence, as well on the part of the United States as of the defendant, and having heard all the evidence and argument of counsel, and having been

charged and instructed by the Court, retired to consult of their verdict, and afterwards returned into Court the following verdict: "We, the jury, find the defendant guilty in manner and form as charged in the information."

And on April 27, 1881, the following proceedings were had:

Comes the defendant, by R. A. Howard, Esq., his attorney, and files herein his motion for a new trial.

Which motion is as follows:

Comes the defendant, and moves the Court for a new trial herein, because the defendant was found guilty on the second count of said information when there was no evidence to support the same; because the evidence was not sufficient to sustain the verdict on either count of said information.

E. W. KIMBALL,
ROBT. A. HOWARD,
*Attorneys for Defendant.*

Endorsed:

Filed April 27, 1881.

RALPH L. GOODRICH,
*Clerk.*

And on May 10, 1881, the following:

Comes the United States, by Charles C. Waters, Esq., district attorney; and comes the defendant, by R. A Howard, Esq., his attorney; and the motion for a new trial, heretofore filed herein, is heard, argued, and submitted to the Court, and the Court not being now well and sufficiently advised in the premises, takes time to consider of its judgment herein.

And on May 16, 1881, as follows:

Comes the United States, by Charles C. Waters, Esq., district attorney, and comes the defendant to the bar of

the Court in custody of the marshal, and by E. W. Kimball, Esq., his attorney, and the Court being now well and sufficiently advised of the matters arising on the motion for a new trial, considers that the same be overruled, and the said defendant being now inquired of by the Court if he have aught to say why the judgment and sentence of the Court should not now be pronounced against him upon the verdict and finding of the jury in this case, finding him guilty of passing a counterfeit United States bond, and saying nothing further than he hath already said; and the Court being now well advised in the premises, it is therefore considered, ordered, adjudged, and sentenced that said defendant, James S. Wilson, do pay to the United States a fine of five thousand dollars for said offense and all the costs of this proceeding, and that the United States have execution therefor; and that he be imprisoned for and during the term of fifteen years at hard labor in the House of Correction, at Detroit, Michigan; and that the said marshal of this district convey the said prisoner to the House of Correction aforesaid, and deliver him to the custody of the keeper thereof; and that the clerk of this Court make out for said marshal two copies of this judgment and sentence duly certified under the seal of this Court, one of which the said marshal shall deliver to the keeper of said House of Correction, and the other return and file in this Court, with the receipt of said keeper thereon.

The following is the charge of the Court to the jury:

*First.* If you find from the evidence that the defendant had in his custody or possession any obligation or other security, engraved and printed after the similitude of interest bearing coupon bonds of the United States, with intent to sell and otherwise use the same for the purpose of defrauding, you will find him guilty.

*Second.* If you find from the evidence that the defendant, with like fraudulent intent, passed, uttered, published, or sold, or attempted to pass, utter, publish, or sell, a false,

forged or counterfeited United States interest bearing coupon bond, you will find him guilty.

*Third.* If you find the bond which the defendant uttered and passed has such a resemblance to any of the securities of the United States, mentioned in the information, as to be calculated to deceive persons of common or ordinary observation, then he is guilty, as charged in the first count of the information, and you should so find. To constitute the offense under that count it is not necessary the similitude between the false and the true security should be such as to deceive bank officers, experts, or cautious men with good eyes or a miscroscope. The offense is made out when the similitude or resemblance or likeness is such as may be calculated to enable one desiring to perpetrate a fraud; to palm off on an honest sensible man, of ordinary observation and experience, the false security as a genuine security. The law does not require the citizens generally to possess a technical knowledge of the laws of the United States relating to her securities, such as the frame, form, size, color, terms, and signatures to United States bonds. And it does not follow that the defendant is not guilty if it appears by careful examination of the alleged fraudulent bond that it does not purport to be a bond of the United States, but on the contrary, when so examined, appears or purports to be a bond issued by some mining company. Does the fraudulent bond bear such a likeness or resemblance to any of the genuine bond securities of the United States as to be calculated to deceive an honest, sensible, and unsuspecting man of ordinary care and observation dealing with a supposed honest man? If it does then the similitude required by law to make out the offense exists.

Men are not required to carry with them magnifying glasses or counterfeit detectors, and put them in use every time they have a business transaction; nor are they required to act upon the supposition that every man with whom they have a business transaction is a forger or thief.

UNITED STATES OF AMERICA, EASTERN DISTRICT OF ARKANSAS.

I, Ralph L. Goodrich, Clerk of the District Court of the United States for the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the originals remaining of record in my office.

In witness whereof, I have hereunto set my hand and the seal of said Court this 3rd day of August, in the year of our Lord one thousand eight hundred and eighty-one, and of the independence of the United States of America the one hundred and sixth.

[SEAL.] RALPH L. GOODRICH,
*Clerk.*
By W. P. FIELD, D. C.

[COPY OF COMMITMENT.]

UNITED STATES OF AMERICA,

EASTERN DISTRICT OF ARKANSAS.

Be it remembered, that at a District Court of the United States of America, in and for the Eastern District of Arkansas, begun and holden on Monday, the 4th day of April, A. D. 1881, at the United States Court-room, in the the City of Little Rock, Arkansas, the Honorable Henry C. Caldwell, judge, presiding and holding said Court, the following proceedings were had, to wit, on May 16, 1881:

171] United States *vs.* James S. Wilson. } Passing Counterfeit U. S. bond.

Comes the United States, by Charles C. Waters, Esq., district attorney, and comes the defendant to the bar of the Court in custody of the marshal, and by E. W. Kimball, Esq., his attorney, and the Court being now well and sufficiently advised of the matters arising on the motion for a new trial, considers that the same be overruled, and the said defendant being now inquired of by the Court if he have aught to say why the judgment and sentence of the Court should not now be pronounced against him upon the verdict and finding of the jury in this case, finding him guilty of passing a counterfeit United States bond, and saying nothing further than he hath already said; and the Court being now well advised in the premises, it is therefore considered, ordered, adjudged, and sentenced, that said defendant, James S. Wilson, do pay to the United States a fine of five thousand dollars for said offense and all the costs of this proceeding, and that the United States have execution therefor, and that he be imprisoned for and during the term of fifteen years at hard labor, in the House of Correction, at Detroit, Michigan, and that the marshal of this district convey the said prisoner to the House of Correction aforesaid, and deliver him to the custody of the keeper thereof. And that the clerk of this Court make out

for said marshal two copies of this judgment and sentence, duly certified under the seal of this Court, one of which the said marshal shall deliver to the keeper of said House of Correction and the other return and file in this Court, with the receipt of said keeper thereon.

UNITED STATES OF AMERICA, EASTERN DISTRICT OF ARKANSAS.

I, Ralph L. Goodrich, Clerk of the District Court of the United States for the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writing annexed to this certificate is a true, correct, and compared copy of the original remaining of record in my office.

In witness whereof, I have hereunto set my hand and the seal of said Court this 16th day of May, in the year of Lord one thousand eight hundred and eighty-one, and of the independence of the United States of America the one hundred and fifth.

[SEAL.] RALPH L. GOODRICH,
*Clerk.*

Attest:

*Robert Clarke & Co., Printers, Cincinnati, O.* [*October, 1884.*

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1884.

## *EX PARTE JAMES S. WILSON.*

### HABEAS CORPUS.

**Brief of Alfred Russell, in Favor of Petitioner.**

*Robert Clarke & Co., Printers, Cincinnati, O.*] [*October, 1884.*

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1884.

## *EX PARTE JAMES S. WILSON.*

### HABEAS CORPUS.

**Brief of Alfred Russell, in Favor of Petitioner.**

The petitioner is confined in the House of Correction at Detroit, under sentence from the District Court, Eastern District of Arkansas.

The grounds of his application are set forth in his printed petition, to which a printed copy of the record of conviction is attached; a printed copy of the commitment also.

Applications have heretofore been made to the District Court, Eastern District of Michigan (H. B. Brown, J.), and to the Circuit Court, Eastern District of Michigan (Matthews, J.), and refused mainly on the ground that the questions involved were of too much importance to be passed on by any Court except the highest. I briefly discuss these questions.

Although the Court had jurisdiction of the person and

of the offense, yet the judgment was in *excess* of the *authority* of the Court and forbidden by the constitution, and in such a case is inquirable into collaterally, and the prisoner is entitled to a discharge on *habeas corpus*.

*Ex parte Lange*, 18 Wall. 176, 177.

*Ex parte Karstendick*, 93 U. S. 396.

I.

It was an *excess* of the *power* of the Court to hold the prisoner to answer for the infamous crime of having in possession a bond in the similitude of a U. S. bond upon an information.

Amendment V., U. S. Constitution.

An infamous crime in England included every species of the *crimen falsi*, including *forgery*, and every counterfeit bond is a forged bond, and passing it is uttering forged paper.

Roscoe's Crim. Evid. 135.

By the Revised Statutes, New York, the term infamous crime, when used in any statute, is defined as including every offense punishable by death or imprisonment in the state prison, and that is the general understanding of the profession.

2 R. S., N. Y., p. 702, sec. 31; p. 587, sec. 32.

So, in Michigan Compiled Laws, the same definition is given to the term felony.

2 C. L. 1871, par. 7820.

Uttering a forged instrument is felony because punishable by imprisonment in the state prison.

*People* v. *Brigham*, 2 Mich. 550.

*This is the very offense for which the prisoner is sentenced in this case.*

Larceny under twenty-five dollars was a felony at common law, and is in this state.

Wharton Crim. Law, sec. 1.

4 Blackstone's Comments. 99.

1 Hale P. C. 530, 587.

*Drennan* v. *People*, 10 Mich. 169.

Now, by the 34th section of the Judiciary Act, the laws of the several states are rules of decision in the Courts of the United States in trials at common law, which includes criminal cases, according to the law thereof in the several states when the United States Courts were established in them.

*United States* v. *Williams*, 1 Clifford, 16.

*United States* v. *Maxwell*, 3 Dillon, 278.

*United States* v. *Reid*, 12 Howard, 361.

The Michigan definition of felony, given above, existed in the revisions of 1846 and 1838 and the earlier statutes, and under the above decisions must prevail in this case in this Court.

I can not have the slightest doubt in this matter. In the case of *United States* v. *Field*, 16 Fed. Rep. 779, Francis Wharton, the accomplished writer on criminal law, seems to me to demonstrate that the decisions he criticises are wrong. Of course, District Judge Wheeler, in Vermont, in the Second Circuit, was bound to follow Circuit

Judge Blatchford. I submit that this first objection is well taken. See also:

*Ex parte Mulligan*, 4 Wallace, 68, 123, 138.
2 Abbott's Practice, 184, note, Col. Cas.
*United States* v. *Maxwell*, 3 Dillon, 280, cases pro and con.
*United States* v. *Waller*, 1 Sawyer, 701, Field, J.
15 Int. Rev. Rec. 57.
*United States* v. *Cultus Joe.*

II.

Section 1022 R. S. U. S. expressly confers the power upon the district attorney to proceed by information for crimes committed against the provisions of chapter 7, title Crimes, R. S. U. S. Congress having legislated upon the subject, has exhausted it, and having expressly conferred the power in one class of cases upon a familiar rule of construction, has excluded the power in all other cases.

The offenses named in this information are not included in said chapter 7, and therefore the prisoner was unlawfully held to answer upon information in excess of the power of the Court.

III.

The prisoner was convicted of having in possession the mining company bond incorporated in the record, but he was sentenced for another offense, viz., for passing a counterfeit U. S. bond. It surely needs no argument to show that this was in excess of the power of the Court, and that the sentence is void.

IV.

There were two questions of fact to be ascertained and determined upon the record as conditions precedent to the exercise of the power of the Court to sentence to a prison outside the state. First, that there was no suitable prison in the state, and, secondly, that the attorney-general had designated the Detroit House as a suitable penitentiary outside the state.

The legislation on these subjects is reviewed by the chief justice in the second part of his opinion in the case of *Ex parte Karstendick*, 93 U. S. 396, and it is manifest that, there being no showing on the record or in the copy of the sentence under which the keeper claims to hold the prisoner of either of the above facts, the judgment of the Court that the prisoner be confined in the Detroit House was in *excess* of the authority of the Court, and utterly void.

V.

Section 1028 R. S. U. S., the only provision on the subject, undoubtedly makes a writ, warrant, or mittimus, directed to the keeper and commands him to hold the prisoner, the only lawful process. A mere copy of a sentence is not authorized or contemplated by the above statute. See also the following authorities as to the common law writ:

Tiffany's Crim. Law, 121.

1 Chitty's Crim. Law, § 3389, pp. 93, 94, 95.

9 N. H. 204.

The petitioner is entitled to be discharged beyond question, irrespective of what the results may be to others, or in other cases. He is held against law, and every day he is further held is in violation of law. Moreover, he has already suffered confinement, without authority of law, for nearly three years.

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## OBJECTIONS.

I. It is suggested that this Court can only look at the paper by which the prisoner is held by the keeper. Even if this were so, the prisoner must be discharged, because it does not affirmatively appear in the copy of sentence, or judgment of the Court in the keeper's possession, as his authority for holding the prisoner, that there has been a finding that there is no suitable prison in the district where the prisoner was convicted, and that the attorney-general has designated the Detroit House. Without these two facts, it appears upon the face of the commitment that it is simply void. Nothing can be presumed with regard to either of these facts outside the copy of the commitment, and certainly not outside the transcript of the record presented by the petitioner.

But, beyond question, this Court may look into the *whole record* on *habeas corpus*. In the case of *Karstendick* the Supreme Court, ~~which has no more power on *habeas corpus* than this Court~~, *did* examine the whole record (93 U. S. 402 and 405), and on page 402, *middle*, the Court make an *extract from the record*, *viz.*, a copy of the order of the U. S. Attorney-general, under section 5546 R. S. U. S., designating the penitentiary outside the state to which the

trial Court might, by law, commit prisoners. In the case at bar the record shows nothing of the kind, nor does the sentence show any thing of the kind, and this Court has no authority to presume any thing which must affirmatively appear to warrant the action of the committing Court. So far as the record and copy of sentence show, the committing Court had not the shadow of authority to commit the prisoner to the Detroit House of Correction, under the statutes and under their *interpretation* in the *Karstendick* case.

II. On looking into the record, it appears that the petitioner was found guilty of one offense, and sentenced for another. Surely it requires no argument or authority to show that was in excess of the power of the Court and *void.*

III. The sentence to the Detroit House was void—

*First.* The Court was in the exercise of special statutory jurisdiction in committing to a prison outside the district, and as to such a proceeding it is not aided by any presumptions.

*Second.* Neither the sentence nor the record contain any recital of the facts requisite to confer the statutory jurisdiction.

*Third.* The sentence is silent as to jurisdictional facts, and the record establishes that such facts did *not* exist.

*Fourth.* Neither the sentence nor the record exhibits the facts which are "*conditions precedent*" to the right to

send the prisoner out of the state, and which are esssential to the jurisdiction to do so.

All these principles with regard to collateral attack of legal process in criminal cases are elementary, and are expressly recognized in *Ex parte Karstendick*, 93 U. S. 396.

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## PRACTICE.

*First.* "The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus*."

R. S. U. S., sec. 751.

The amplification of this power in section 753, R. S. U. S., is precisely the same as to all the Courts of the United States.

1 Abbott's U. S. Practice, 268.

As to *all* the Courts of the United States *alike*, the proceeding is *in the nature* of a writ of error, and necessarily so, because it is an inquiry into the sufficiency of the action of the committing Court. The District Court, Eastern District of Arkansas, can exercise no power whatever within the Eastern District of Michigan, except by virtue of the special statutes which are considered in the Karstendick case, and this Court and the Supreme Court have the same extent of inquiry as to the existence of the conditions precedent to an order confining a man within this district.

*Second.* In *Ex parte Virginia*, 100 U. S. 343, top, it is stated that the regular proceeding is to take the writ from the District or Circuit Court in the first instance, and that the action of these Courts upon such a writ may be reviewed by the Supreme Court, and the opinion clearly states that it is optional to pursue the above course, or to apply to the Supreme Court in the first instance.

Same, bottom page 342.

Same, top page 343.

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IN THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF MICHIGAN.

I now refer to Judge Longyear's opinion in the Osterhous case, at Detroit.

This case was decided in 1870–71. I was for the petitioner, who was sentenced by a territorial Court in Wyoming to the Detroit House. I relied upon two points: First, that a territorial Court was not a Court of the United States, and therefore had no power to send the prisoner here, and on this the Court was against me. Secondly, on the point that this State had not allowed the United States the use of the House, and this point was cured by an act obtained at Lansing after the filing of the petition, and before the decision of the judge.

Whatever was said by Judge Longyear outside the above was a mere dictum, which he tested, however, upon the case of *Ex parte Watkins*, 3 Peters, 193, decided in 1830, mainly upon the authority of the previous case of *Kemp* v. *Kennedy*, 5 Cranch, 173.

Now, what I have to say in regard to both those cases cited by Judge Longyear, is this: That the doctrine of each has been essentially modified by decisions of the Supreme Court, rendered since Judge Longyear decided the Osterhous case.

Those early cases cited by Judge Longyear held that erroneous judgments of the Courts of the United States could not be treated as void, because the record does not show the jurisdiction, but are voidable only by writ of error, and that a Court which could not review such judgments by writ of error would be bound by such judgments, both in cases concerning the title to property and in criminal cases where the prisoner seeks discharge in another court.

At the present day the Supreme Court holds no such doctrine, but has established the more reasonable doctrine that a judgment of a Court of the United States, when collaterally assailed, is valid only to the extent to which it was authorized by law, and within the power of the Court conferred upon it by law, even where the Court had jurisdiction, both of the subject-matter and the person.

(1873.) *Ex parte Lange*, 18 Wall. 175, 176, 177.
(1881.) *Ex parte Rowland*, 104 U. S. 612.
(1876.) *Windsor* v. *McVeigh*, 93 U. S. 283, 282.
(1875.) *Semmes* v. *United States*, 91 U. S. 27.
(1876.) *Ex parte Karstendick*, 93 U. S. 396, 397.

In *Ex parte Lange*, Mr. Justice Clifford dissented upon the authority of the Watkins case. See pages 187, and especially 205, 18 Wallace, cited in the Watkins case.

In *Windsor* v. *McVeigh*, the action was ejectment, and the defendant set up a deed under a decree of the United States District Court, confiscating the land. (Just as in

*Kemp* v. *Kennedy*, 5 Cranch, cited by Judge Longyear, the defendant in ejectment set up a judgment of a New Jersey Court, confiscating the land.) In each of these cases the Court confiscating the land had exceeded its jurisdiction, and in each of these cases the judgment was collaterally attacked, and in the *later* case successfully attacked upon the grounds stated with great force on pages 282 and 283.

The case of *Windsor* v. *McVeigh* is also authority upon the point which I have made that the action of the Arkansas Court in imposing a sentence for one offense when the petitioner had been convicted of another was void. As is said by the Court on page 283, a judgment of a Court having jurisdiction *can* be collaterally assailed unless "the Court proceeds after acquiring jurisdiction of the cause according to the established mode governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it." Page 283. On the same page, the Court says: "So a departure from established modes of procedure will often render the judgment *void*. Thus, the sentence of a person charged with felony, upon conviction by the *Court*, without the intervention of a jury, would be *invalid for any* purpose. The decree of a Court of equity upon oral allegations, without written pleadings, would be an idle act of no force beyond that of an advisory proceeding of the chancellor. And the reason is that the Courts are not *authorized* to *exert* their power *in that* way."

The place of imprisonment is a part and an essential part of the sentence.

That place (without special legislation) must be within the jurisdiction of the Court pronouncing the sentence. If the sentence be to one prison and the confinement is in another, an action lies for false imprisonment.